No. 11,660

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JACOB S. GIMPELSON,

Appellant,

vs.

MAX KAUFMAN, doing business as the CHICAGO HOTEL AND RESTAURANT SUPPLY; and CHICAGO HOTEL, RESTAURANT AND MEAT SUPPLY, INC., a corporation,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Statement of the Case.

This is a re-employment case arising under the Selective Training and Service Act of 1940, as Amended (Secs. 8, 16(b), 50 U. S. C. A. App. Secs. 308, 316(a)), hereinafter referred to for convenience as "the Act." The case is here on appeal from a District Court judgment in favor of appellees.

The basic issues involved in the appeal are:

1. *Is re-employment dictated by the Act where the employer for imperative business necessity and in good faith transfers his business to a new enterprise in which he obtains a minority interest?*

2. *Is the new enterprise obligated to employ by reason of the minority interest held by the former employer?*

3. *Is there an application for re-employment by reason of the fact that after full explanation of the new enterprise and the changed conditions, the former employee accepts from the new enterprise a different position with different pay, status, and duty, making no objection till after the expiration of the statutory period for application, and knowing in the meantime that further investment is being made in the business?*

The trial court answered all of these questions in the negative.

While appellant argues (App. Br. Point IV, p. 67) that there was a discharge without cause within one year after "re-employment", this cannot be deemed to be an issue in the case for appellant concedes that there was not "re-employment" within the meaning of the Act (50 U. S. C. A. App. Sec. 308(b)), and there is therefore no occasion to consider rights which accrue only "after such restoration" (50 U. S. C. A. App. Sec. 308(c)).

Appellant specifies no error in Findings of Fact I, II, III, IV, V, and VI. Therefore, the following facts are undisputed:

> On and prior to October 23, 1942, the appellee Kaufman owned and operated a wholesale and retail meat business on Temple Street, Los Angeles, and a meat market on Fairfax Avenue, Los Angeles, and employed appellant, a nephew, in the Temple Street business.

On October 23, 1942, the appellant left his position in appellee Kaufman's Temple Street business to perform training and service in the Army, into which he was on that day inducted under the Selective Training and Service Act of 1940. The appellant entered on active duty November 6, 1942, and satisfactorily completed his period of training and service on November 6, 1945.

In 1943, appellee Kaufman sold the Fairfax market, and thereafter devoted his full time and attention to the Temple Street business.

In December, 1944, the State of California, in eminent domain proceedings, condemned for road purposes the premises on which the Temple Street business was conducted. In 1944, the Temple Street premises were declared by an official of the City of Los Angeles to be unfit for the conduct of a wholesale meat business.

In 1944 and 1945, the appellee Kaufman (a man past sixty years of age) was in ill health, and was advised by a physician to retire from business. By reason of ill health, the difficulties of staying in business during the meat shortage, and the necessity of finding new premises for the business, the appellee Kaufman intended to retire from business completely, and would have done so but for the intervention of his two brothers, one of whom had previously been a business partner.

Omitting the disputed portions of Findings of Fact VII and VIII, the following are added to the undisputed facts:

In 1945, the three brothers agreed to form a corporation in which the appellee Kaufman would own 40% of the capital stock, and his two brothers 30% each.

In furtherance of this agreement, one of the brothers sold out his business interests in Chicago, and moved his family to Los Angeles.

Before incorporating, the two brothers of appellee Kaufman advanced Eleven Thousand Dollars ($11,000.00) with which to carry on the business and purchase new premises. Appellee corporation was incorporated January 21, 1946, and commenced active business operation on April 2, 1946.

Additional facts (concerning which there is controversy) are as follows:

At the same time appellee Kaufman and his two brothers agreed to form the corporation, it was agreed that until the corporation began functioning, the former business would be run as a partnership with interests the same as in the contemplated corporation, *i. e.* 40% to appellee Kaufman and 60% to his two brothers; so that, in fact, when appellant returned from service, appellee Kaufman neither owned nor controlled the business.

The corporation was formed for a *bona fide* business purpose, and is not appellee Kaufman's *alter ego*—he being

merely a minority stockholder. Total monies supplied by appellee Kaufman and his brothers have increased the capital investment in the corporation to approximately three times the value of the former business.

When appellant returned from service, it was explained to him that his former employer no longer owned the business. Appellant nonetheless accepted work in the new business without objection, in a position different in duty and compensation than his pre-war job. Appellant made no application for re-employment in his pre-service position or one of like seniority, status, and pay, until more than ninety (90) days after his discharge from the service.

The specific questions to be decided by this Court, therefore, are:

1. Are the following Findings of Fact "clearly erroneous"?:

(1) That portion of Finding VII reading:

> ". . . it was further agreed by the three brothers that before the corporation began functioning, the business would be run as a partnership, with interests in the above proportions." [R. p. 24.]

(2) That portion of Finding VIII reading:

> "Additional monies supplied by the three brothers has increased the capital investment in the corporation to approximately three times the value of the respondent Kaufman's former business. There is no evidence to indicate that respondent corporation was

not formed for a *bona fide* business purpose, or that it is the alter ego of the respondent Kaufman." [R. p. 24.]

(3) Finding IX:

"In January, 1946, respondent Kaufman neither owned nor controlled the business where petitioner was formerly employed. Petitioner was employed in the business under the new ownership in January, 1946, and on April 2, 1946, by respondent corporation, in a position different from the one held by petitioner on October 23, 1942. This new position was accepted by petitioner without objection after a full explanation of the changed circumstances and character of the business." [R. pp. 24-25.]

(4) Finding X:

"Petitioner made no application for re-employment in his former position, or a position of like seniority, status, and pay prior to late March or April, 1946." [R. p. 25.]

2. In any event, under the facts of the case,

(1) Were the employer's circumstances so changed as to have made re-employment unreasonable?

(2) Was the corporate appellee obligated to re-employ?

(3) Was there a timely application for re-employment?

ARGUMENT.

POINT I.

Summary.

Under the most liberal construction of the Selective Training and Service Act that is possible without doing violence to the clear language of the law, there was in this case a substantial change of circumstances making re-employment clearly unreasonable, under any practical or reasonable interpretation of the Act. This alone is sufficient to sustain the judgment.

Through no fault of his own, the former employer's business premises were taken in eminent domain proceedings. The situation was succinctly described by the trial judge [R. p. 156].

> "The business, the property itself was effected and disposed of. He disposed of the Fairfax market in the meantime.
>
> "Here was a man who was getting along in years. He had to either pull out or bring in new blood. Those things necessarily transpired. They were not done intentionally for the purpose of avoiding any responsibility that he may have owed to the petitioner. I feel that conditions had so changed that for him to have done otherwise would have been unreasonable and impossible."

The new enterprise in this case brought into the business new capital, and—of decisive importance—new ownership. Ownership formerly vested one hundred (100%) per cent in the appellee Kaufman, was so affected as to leave him with a minority forty (40%) per cent interest with control, sixty (60%) per cent, in the hands of persons who before had no ownership whatsoever. This is a far cry from any of the cases remotely connected with the point, which are cited by appellant, in every one of which there was simply change of form and not of substance.

Under the Act, application for re-employment within ninety (90) days of discharge is a condition precedent to any obligation to restore to former position. On this point, two generalizations may be made concerning the cases cited by appellant where re-employment was ordered:

(1) Without exception, in every case there was timely application, and refusal of re-employment.

(2) Without exception, in every case where restoration was denied by the employer and a different job offered, the veteran rejected such employment.

In the case at bar, there was no timely application. This alone is sufficient to sustain the judgment. In addition, the appellant accepted a different employment without objection, with knowledge of the facts. This knowledge included the fact that new money was to be added (and was added) to the business after such new employment.

On the question of application for re-employment, as well as other matters, there were conflicts in the testimony. These, the trial judge—observing the demeanor of the witnesses—properly resolved in favor of appellee.

Analysis of the evidence (misquoted, miscited, and misconstrued in appellant's so-called "The Facts"*) and the applicable law demonstrates that:

(1) Appellant has not sustained the burden of proving that the disputed Findings are "clearly erroneous";

(2) The Findings are supported by substantial evidence and are clearly correct;

(3) The Conclusions of Law are plainly dictated by the law and the facts of the case; and

(4) The judgment of the trial court is manifestly just, and should be affirmed.

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*Pertinent portions of the so-called "The Facts" (App. Br. pp. 15-52) are discussed at a later point.

POINT II.

Weight of Findings of Fact on Appeal.

1. The Burden Is on the Appellant to Show That the Disputed Findings Are "Clearly Erroneous."

The pertinent portion of Rule 52(a) of the Federal Rules of Civil Procedure reads as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In accordance with the foregoing rule, this Court has consistently held that the burden is on the appellant to show that the trial court's findings are "clearly erroneous."

Augustine v. Bowles etc., 9 Cir., 149 F. (2d) 93, 96 (1945);

Gates et al. v. General Casualty Co. of America, 9 Cir., 120 F. (2d) 925, 927 (1941).

2. The Appellant Is Discredited as a Witness.

This Court has likewise taken occasion to stress the role of the trial judge in passing on the credibility of witnesses.

Universal Pictures Co., Inc. v. Cummings, 9 Cir., 150 F. (2d) 986, 987 (1945);

Gates et al. v. General Casualty Co. of America, supra.

In the *Universal Pictures Co. Inc. Case, supra,* this Court commented:

> "These are the findings of a judge who had the advantage of hearing the testimony and judging the credibility of the witnesses."

In the instant case, the District Court judge had the opportuntiy to compare the testimony of the glib appellant with the broken but honest English of the appellee Kaufman. He was able to compare the rapid-fire, ready recollection of appellant on direct examination with appellant's halting and contradictory back-tracking on cross-examination.

To note but a few examples:

(1) On the question of new money in the business, appellant at first denied and then admitted that he knew outside capital had come into the business [R. p. 61].

(2) On the question of objection to salary, appellant (speaking of appellee Kaufman) at first gratuitously volunteered:

> "I had never asked him for money as long as I had been with him." [R. p. 64.]
>
> Soon realizing, however, that this was very poor testimony, he recalled "many" times that he had complained to appellee Kaufman about his low salary [R. p. 65].

(3) On the question of appellant's talk of trouble with the Office of Price Administration unless appellant were employed, appellant at first denied that he had mentioned "OPA" to appellee Kaufman; yet, after some prodding, admitted that he had [R. pp. 70, 71].

Other instances of the unreliablity of appellant as a witness, and of his being given the lie by appellee Kaufman, will be noted in the body of the argument.

At the conclusion of all the testimony, the trial court declared:

> *"I want to say frankly, that I have been more impressed by Mr. Kaufman than I have been with the petitioner in their testimony. It carries more weight with me."* [R. p. 155.]

POINT III.

The Employer's Circumstances Have so Changed That It Would Have Been and Is Unreasonable to Restore Appellant to His Former Position or to a Position of Like Seniority, Status, and Pay.

1. Nature of the Provision.

A. Constitutional Question.

Even though all other conditions of the Act are met, restoration is not required if:

> ". . . *the employer's circumstances have so changed as to make it impossible or unreasonable to do so;*". (Section 8.)

The importance of this provision from the standpoint of the Federal Constitution is indicated in *Trusteed Funds, Inc. v. Dacey,* 1 Cir., 160 F. (2d) 413, 419 (1947), where it is stated:

> "The qualification in Section 8 . . . certainly removes any question as to the validity of Section 8 under the due process clause."

Thus it appears that the drafters of the Act intended to make constitutionally certain that the re-employment power would not be arbitrarily exercised, but would be applied with care to the circumstances of every individual situation.

B. Rule of Construction.

Appellant properly states that the Act is to be liberally construed in favor of the veteran (App. Br. p. 53). Such doctrine is approved by the Supreme Court of the United States in *Fishgold v. Sullivan Drydock & Repair Corp.,*

et al., 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. ..... (1946). It is important to note however, that the *Fishgold Case* itself was decided against the veteran, indicating that an announced rule of liberal construction is not to be taken as a license to do violence to the Act itself or to the rights of citizens generally. That this is so, is emphasized in the later case of *Trailmobile Co., et al. v. Whirls,* 331 U. S. 40, 60, 67 S. Ct. 982 (1947), where the high court in reversing a judgment in favor of the veteran declared:

> "These reasons, founded in the literal construction of the statute and the policy clearly evident on its face, are sufficient for the disposition of the case."

This Court, too, in a decision discussed later in this brief (pages 15, 47 and 56), has indicated that the Act is not to be "liberally" construed out of all reasonable shape.

Brown v. Luster, et al., 9 Cir., No. 11,544 (1947).

That the judge of the District Court deciding the case at bar was thoroughly aware of the rule of liberal construction is abundantly clear. *Lee v. Remington Rand, Inc.,* 68 F. Supp. 837, 839 (1946), cited by appellant (App. Br. p. 53) as an authority for liberal construction, was decided by the same District Court judge who heard the instant matter. That the court had the rule in mind during the trial of this action is apparent from the record [R. p. 90]:

> "It has been the policy of this court to give the petitioners the break. In other words, give the evidence a liberal construction."

C. Application to Varied Situations.

What exactly constitutes such a change of circumstances as to render restoration impossible or unreasonable has been determined in a variety of factual situations.

(i) *Cases Where Restoration Has Been Ordered.*

The mere fact that re-employment would make for some loss of efficiency or added expense, is not grounds for refusal of re-employment (*Kay v. General Cable Corporation,* 3 Cir., 144 F. (2d) 653 (1944)).

A divided court has held that where, by a change in the supply of and demand for a commodity, the veteran would earn monies in excess of his pre-war earnings, there was not such a change of circumstances, at least not when it was shown that others working for the employer were doing the veteran's prior work at the increased compensation (*Levine v. Berman,* 7 Cir., 161 F. (2d) 386 (1947)).

Testimony of a financial crisis in the affairs of the employer has been rejected when it affirmatively appeared that when the veteran applied for re-employment such conditions no longer existed and it was then reasonable to re-employ (*Van Doren v. Van Doren Laundry Service, Inc.,* 3 Cir., 162 F. (2d) 1007 (1947)).

The foregoing are the cases cited by appellant under the heading of impossibility or unreasonableness of restoration (App. Br. p. 65).

Concerning changes in ownership and control, some courts have decided the matter by the test of "change of circumstances," others by the test of whether or not the new business were actually the old employer.

On this phase of the problem appellant has cited (App. Br. p. 66) four cases arising under the Act: the reversed decision of the Sixth Circuit in *Trailmobile Co., et al. v. Whirls,* 6 Cir., 154 F. (2d) 866 (1946), involving the merger of a *wholly owned* subsidiary with the parent corporation; *Sullivan v. Milner Hotel Co., et al.,* D. C., E. D. Mich. S. D., 66 F. Supp. 607, 610 (1946), involving the switch of salary disbursing and bookkeeping functions only, from one to another of two affiliated corporations in the same hotel chain, "without any other change in the conduct, composition, ownership or control of such office . . ."; *Karas v. Klein, et al.,* D. C., D. Minn., 3rd Div., 70 F. Supp. 469, 472 (1947), where the partners who were the pre-service employers became *all* the officers and owned *all* the stock of a successor corporation, the court declaring that: "The change is one of form rather than substance."; and the decision of this Court in *Brown v. Luster, et al., supra,* which was a case decided *against,* not for, the veteran, and in so far as it has any relevance to the proposition for which it is cited by appellant, simply calls attention to the fact that where all the pre-service partners incorporated their business "the identity of the business was not lost by such change."

(ii) *Cases Where Restoration Has Been Denied.*

The required change of circumstances may arise through a substantial decrease in the volume of business (*Meyers v. Barenburg,* 4 Cir., 161 F. (2d) 850 (1947)); misconduct on the part of the former employee (*McClayton v. W. B. Cassell Co.,* D. C., D. Md., 66 F. Supp. 165 (1946)); or a change in method of doing business incident to new stock ownership of the employer corporation (*Featherston v. Jersey Central Power & Light Co.,*

3 Cir., 161 F. (2d) 1000 (1947)), this latter decided by the same tribunal which decided *Kay v. General Cable Corporation, supra.*

It has been repeatedly held that a new owner, corporate (*Hastings v. Reynolds Metals Co.,* D. C., N. D. Ill., E. Div., 12 C. C. H. Lab. Cases 70, 797, Par. 62, 680, #46c, 1431 (1947)) or individual (*McFadden v. Dienelt, et al.,* D. C., N. D. Calif., S. D., 68 F. Supp. 951 (1946)); *Newman v. Finer,* D. C., S. D. Calif., Cent. Div., 11 C. C. H. Lab. Cases 69, 657, Par. 63, 307 (1946)) is not obligated to employ the former employee of the purchased business. This is true whether the purchase be of a portion of the assets of the old business (*Hastings Case, supra*) or of all the assets (*McFadden Case, supra; Newman Case, supra*).

(iii) *Discretion of the District Courts.*

The foregoing cases, decided for and against restoration, make it abundantly clear that no hard and fast rule exists as to precisely what constitutes such a change of circumstances as to make re-employment impossible or unreasonable. The very word used in the Act, *"unreasonable"*, one of constitutional as well as common-law significance, indicates an intent to permit wide scope of application.

On this point, instructive interpretation is found in the language of the First Circuit in the cross appeals of *Boston & M. R. R. v. Bentubo,* 1 Cir., 160 F. (2d) 326, 328 (1947), and *Bentubo v. Boston & M. R. R.,* same cite, referred to by appellant in another connection (App. Br. p. 67):

> *"In the first place Congress did not make the right to re-employment absolute. It gave that right only*

when the employer's circumstances had not so changed as to make it not only not impossible, but also not 'unreasonable' for the employer to re-employ the veteran. It must therefore have envisaged the probability that in the future an infinite variety of factual situations would arise, and recognizing the futility of any attempt to prescribe a remedy for every situation, it contented itself with a statement of a public policy and left the application of its policy to particular situations to the sound discretion of the district court."

In this, as in other situations where the matter is left to the discretion of the trier of fact, there should be affirmance unless there is shown a clear abuse of discretion.

2. Essential Facts Concerning Change of Circumstances.

A. Appellee Kaufman's Business Before Appellant Went Into Military Service, October 23, 1942.

(i) *Ownership.*

Concededly, exclusively owned and operated by Kaufman [*undisputed* Finding II, R. p. 23], although in his erroneous statement of "The Facts", (point (3)) appellant obfuscates the fact by describing the period of ownership as "From 1936 until April 1, 1942" (App. Br. p. 15).

(ii) *Location.*

A wholesale and retail meat business on Temple Street, Los Angeles, and a meat market on Fairfax Avenue, Los Angeles [*undisputed* Finding II, R. p. 23].

(iii) *Manner of Operation of Temple Street Business.*

Stores for the conduct of this business were leased, but the adjoining piece of ground—essential to the wholesale business—was owned by appellee Kaufman. The necessity for having this ground was explained by him as follows [R. p. 127]:

> "A. Well, you see this business—I will explain it, this wholesale business. If you can't drive in with a truck and if you can't drive out with a truck, delivery, then the store wasn't any good. I had my own property there but I used to have a drive-in there and I used to have a storage place before I started in to build. We put up papers and all and we deliver—Cudahy brings in the meat to the rear and we deliver it inside on a rail. You see that wholesale goes on a rail and then when we send our trucks out we send them out from the rear, too, you see. We have got to have a rear platform. We have to have a place to unload it, so the main thing was my piece of real estate because the store alone don't do any good."

B. In 1943, Appellee Kaufman Sold the Fairfax Market, and Thereafter Devoted His Full Time and Attention to the Temple Street Business [undisputed Finding IV, R. p. 23].

Relying on the testimony of the discredited appellant, the latter's counsel comments (App. Br. p. 21) that before the sale of the Fairfax market, appellee Kaufman had " 'spent practically all his time on Temple Street' ".

The fact is that seven months before he was drafted, appellant was given increased compensation so that his employer would be able to spend more time at the Fair-

fax market. On this point, appellee Kaufman testified as follows [R. p. 119]:

> ". . . and I was trying to satisfy him because at that time I had a market on Fairfax and I was trying to hold to that market . . . The cooler over there was very good so I thought I will have more time to spare on Fairfax because it is a new market and a great big cooler to do the wholesaling there in the future and Jack should get a little more money here for temporary . . . I just give it to him that time because I wanted to have more of his time—more time he should put into the business. He should take care of that business. I should be able to go down to that market."

Appellant's attempt to belittle the responsibilities and duties of the owner of a meat market [R. p. 40] was simply another illustration of his own unreliability.

In any event the Fairfax market was sold due to notorious difficulties in the meat business with the advent of rationing [R. p. 120]. Even appellant does not endeavor to establish a sinister attack on appellant's "rights" in this sale.

C. Factors Dictating Appellee Kaufman's Intention to Retire From Business.

(i) *Condemnation of the Business Premises.*

"In December, 1944, the State of California, in eminent domain proceedings, condemned for road purposes the premises on which the Temple Street business was conducted" [portion of *undisputed* Finding V, R. p. 23].

In complete disregard of the fact that "the premises on which the Temple Street business was conducted" con-

sisted in part of rented buildings and in part of essential adjoining ground, owned by appellee Kaufman (see, ***supra,*** page 18), "Manner of Operation of Temple Street Business"), appellant in his point (31) of so-called "The Facts" states merely that "the rented property" had been condemned. (App. Br. p. 36.)

As an owner and businessman, appellee Kaufman was consequently faced with the practical necessity of acquiring new premises [portion of *undisputed* Finding VI, R. pp. 23-24], *i. e.,* new buildings, with adjoining vacant land essential to the wholesale meat business, or quit the business.

(ii) *Unfitness of Temple Street Premises for Wholesale Meat Business.*

"In 1944, the Temple Street premises were declared by an official of the City of Los Angeles to be unfit for the conduct of a wholesale meat business" [portion of *undisputed* Finding V, R. p. 23].

Despite the fact that he has specified no error in this finding, appellant in point (16) of his so-called "The Facts" unwittingly, or otherwise, fixes the time of the objection of the Los Angeles City Health Department as 1941 (App. Br. p. 21) instead of the undisputed date—1944.

(iii) *In 1944 and 1945 the Former Employer Was Past Sixty Years of Age*—[portion of *undisputed* Finding VI, R. p. 23].

(iv) *In 1944 and 1945 the Former Employer Was in Ill Health and Was Advised by a Physician to Retire From Business*—[portion of *undisputed* Finding VI, R.

p. 23]. He was, in fact, suffering from an enlargement of the heart [R. p. 121].

(v) *In 1944 and 1945 Meats Were Difficult to Obtain, and It Was Difficult for That Reason to Remain in the Meat Business*—[portion of *undisputed* Finding VI, R. p. 23].

D. It Is Not Questioned by Appellant That by Reason of the Foregoing Factors, Appellee Kaufman Would Have Retired From Business Completely Had It Not Been for the Intervention of His Two Brothers [*undisputed* Finding VI, R. pp. 23, 24].

Despite the fact that appellant has bound himself by failing to specify any error in Finding VI, he now seeks to weaken the vigor of his admission by deliberate misconstruction of the Record [App. Br. p. 22, point (20) of so-called "The Facts"]. Appellant states: "For this reason, he *needed managerial assistance* [*sic*] on Temple Street, and without it, he intended to retire." This conclusion by appellant is so patently false that it is deemed necessary to draw attention to his citation to the Record.

To substantiate his point he cites page 23 of the Record, apparently a reference to *undisputed* Finding VI, which reads as follows:

> "In 1944 and 1945, the respondent Kaufman (a man past sixty years of age) was in ill health, and was advised by a physician to retire from business. By reason of ill health, the difficulties of staying in business during the meat shortage, and the necessity of finding new premises for the meat business, the respondent Kaufman intended to retire from business completely, and would have done so but for the in-

tervention of his two brothers, one of whom had previously been a business partner."

The only other references to the Record are to pages 121 and 122, the only pertinent portions of which follow here *totidem verbis:*

"(Testimony of Max Kaufman)

Q. By Mr. Mellinkoff: Mr. Kaufman, how did it happen that your brothers put money into your business? A. Well, the two brothers? Put money into the business?

Q. Yes. A. When they condemned my real estate the State bought it for a highway and, well, they didn't give me very much money for it and I have an enlargement of my heart and I am over 60. I am way beyond 60.

The Court: How old are you?

The Witness: I am 62.

The Court: You are not old.

The Witness: And my son is a medical man and he was giving me instructions—I shouldn't be active in business and the fact, you know, I have got medicine from every doctor what he send me to—to Dr. Goldberg and Dr. Ferris.

Q. By Mr. Mellinkoff: That is all right, Mr. Kaufman. A. And he didn't want me to become active in the business so I was figuring at that time when the State got the real estate I wanted to sell my trucks and make a little money whatever I can and get out of it altogether.

After my younger brother Joe came and Morris was in the business I used to be in business with Morris—

The Court: Don't go into all the details. Just tell what happened.

The Witness: So Joe propositioned me. He is going to invest money to build a new place, a sanitary place, and Morris went in with it, so we made between ourselves an agreement and they were satisfied with my leadership not to work too hard. We should continue in this business and I am very happy they were.

Q. By Mr. Mellinkoff: All right. Now, Mr. Kaufman—

The Court: Then, as I understand it, you were figuring on quitting business until your brothers wanted you to continue the business?

The Witness: I would yes, if they won't—if they won't start into this business with me I would have sold it all out. I couldn't run it any longer."

It thus must be conceded by appellant that the factors which prompted appellee Kaufman's planned retirement were in no way connected with appellant or his former position.

E. Initiation of the New Enterprise.

The witness Asimow corroborating appellee Kaufman, *supra,* in substantial detail testified as follows [R. p. 101]:

"Q. Do you know how it happened that this new capital came into the business at all? A. Yes. I was aware of it. As I say, Joseph Kaufman came from back East in November and Max approached him with the idea of putting this capital into the business in order to put up a building because they could no longer continue under their present circumstances and he felt that if he—that he would

rather go out of business than risk his own capital in this new venture and that if Joseph Kaufman, who was looking for a proposition at the time, was interested they would all pool their resources and put up this building and incorporate it and so share the responsibilities and the risk involved."

F. Agreement Concerning the New Enterprise.

Appellant has not taken specific exception to Finding VII [R. p. 24]; but though his citation is in error (App. Br. p. 11) appellant does controvert the italicized portion of Finding VII, which Finding reads as follows:

> "In 1945, the three brothers agreed to form a corporation in which the respondent Kaufman would own 40% of the capital stock, and his two brothers 30% each; *it was further agreed by the three brothers that before the corporation began functioning, the business would be run as a partnership, with interests in the above proportions.* In furtherance of this agreement, one of the brothers sold out his business interests in Chicago, and moved his family to Los Angeles."

There was abundant testimony requiring the finding:

(i) *William E. Asimow.*

"The Court: In the incorporation how were the shares divided?

The Witness: 40 per cent to Max Kaufman and 30 per cent to Joseph Kaufman and 30 per cent to Morris Kaufman." [R. p. 100.]

"Q. By Mr. Mellinkoff: When was the corporation actually incorporated, do you know that? A. January 22d, 1946.

Q. Now, prior to the incorporation of the corporation do you know whether or not there was any understanding between Max Kaufman, Morris Kaufman and Joseph Kaufman as to their relationship in that business? A. At the time they first discussed the corporation in November of 1945, they agreed that as soon as the charter came through, why, they would consider themselves all members of the same business.

Q. They agreed to what? A. They would consider themselves as partners, as members of the business. I was advised that the corporation charter had been issued January 22nd, and I was instructed to begin drawing up corporation books, but I didn't have the time necessary to do it so I suggested that they work out the same basis, the corporate basis and use that as a distribution of the profits for the three months so there would be no misunderstanding between the three of them as to who was to share in the profits the first three months while I was preparing the records." [R. pp. 100-101.]

"The Witness: They acted in a rather managerial capacity.

The Court: But their interest in the business was the same as in the corporation?

The Witness: That is right.

The Court: So that it was in a sense, until the corporation went into effect, a partnership?

The Witness: It was an unofficial partnership. It was an interim status until the corporation could be effected." [R. p. 104.]

"The Court: I know but your statement makes it more confusing than ever. These other parties invested money in the business with the understand-

ing that it would be incorporated and the two brothers were to get a 30 per cent interest each?

The Witness: Correct.

The Court: 30 per cent of the stock, and that money went into the business before they were actually incorporated and before the corporation took over the business?

The Witness: That is right." [R. p. 105.]

"They felt that the corporation should be organized when the charter was issued and the business was very profitable for the first three months and they felt they would be cheated unless they had some basis for sharing in those profits. At that time they considered themselves members of the business. At the time it was just a matter of formality that the corporation was not started until April 1st." [R. p. 106.]

(ii) *Max Kaufman.*

"The Witness: So Joe propositioned me. He is going to invest money to build a new place, a sanitary place, and Morris went in with it, so we made between ourselves an agreement and they were satisfied with my leadership, not to work too hard. We should continue in this business and I am very happy they were.

Q. By Mr. Mellinkoff: All right. Now, Mr. Kaufman—

The Court: Then, as I understand it, you were figuring on quitting business until your brothers wanted you to continue the business?

The Witness: I would, yes, if they won't—if they won't start into this business with me I would have sold it all out. I couldn't run it any longer." [R. pp. 121-122.]

(iii) *Joseph Kaufman.*

"The Witness: At that time I gave a deposit on a piece of ground, in escrow $2,000 and more money followed immediately for my partnership in this business.

The Court: What was your agreement? Under what circumstances did you make a deposit upon this ground? What agreement did you have with your brother Max?

The Witness: Your Honor, when I came here I found out that my brother has to go away from the business, that his place is going to be taken away by the State. He was downhearted a little bit after being in business so long in one place, so I tried to cheer him up. I said 'Nothing is lost yet. We don't know. And I might go in with you. We will see what we can do.' And I talked it over with my middle brother, Morris Kaufman, and then I spoke to Max again and I give him a proposition.

The Court: What proposition did you give him?

The Witness: I said, 'Max, what is the use of being downhearted and being sick about it? We will go in. We will build up a new business, a real good going business, and we will be proud of it and I will make you proud of the business that you are in right now,' and I am trying to do that, your Honor.

The Court: Well, did you have any understanding at that time as to the shares? Did you have an understanding with reference to the 40, 30, and 30 basis?

The Witness: Not that my brother asked for it, but his accountant asked for 51 per cent.

The Court: His accountant did?

The Witness: Yes. You know a matter of routine—just conversation. So I explained to him I wouldn't give up a business in Chicago and sell out and come here to my brothers and feel that I only got a minor part in the business. I said, 'I think I am capable of taking an active part and it wouldn't be fair to all of us but it would be fair,' being that he is in the business, 'you should go in 30, 30 and 40.'

The Court: When did you agree on that?

The Witness: That was in 1945, your Honor.*

The Court: When did you decide to incorporate?

The Witness: Right then and there when we went out to buy a piece of ground. I came in when I made up my mind and I set my mind to business immediately and we went out to look up the piece of ground and I gave a personal check, deposit of $2,000 immediately." [R. pp. 135-136.]

(iv) *Morris Kaufman.*

Briefly questioned by the Court and by counsel for appellant, this witness likewise testified that it had been agreed that he was to have a 30 per cent interest [R. pp. 140-141].

G. Functioning of the New Enterprise.

Concerning the functioning of the new enterprise, appellant specifies no error in the first part of Finding VIII [R. p. 24], but takes exception to the portions of Findings VIII and IX italicized below:

"Finding VIII.

"Before incorporating, the two brothers of respondent Kaufman advanced Eleven Thousand Dol-

*Appellant has misquoted the record to make this date read "1946" (App. Br. p. 39).

lars ($11,000.00) with which to carry on the business and purchase new premises. Respondent corporation was incorporated January 21, 1946, and commenced active business operation on April 2, 1946. *Additional monies supplied by the three brothers has increased the capital investment in the corporation to approximately three times the value of the respondent Kaufman's former business. There is no evidence to indicate that respondent corporation was not formed for a bona fide business purpose, or that it is the alter ego of the respondent Kaufman."*

"FINDING IX.

"In January, 1946, respondent Kaufman neither owned nor controlled the business where petitioner was formerly employed. . . ."

As to the question of good faith, the "Factors Dictating Appellee Kaufman's Intention to Retire From Business" (*supra,* page 19) and the *undisputed* Finding VI discussed in subdivision "D" (*supra,* page 21) are sufficient to indicate that there were *bona fide* reasons for founding the new business, unconnected in any way with the appellant.

Further, a statement by the trial court, concurred in by appellant's counsel, explicitly negatives bad faith [R. pp. 154, 155]:

". . . That is an involuntary divestiture of the obligation, but where he willingly does so for his own benefit—

The Court: Counsel, just a moment. That is an unfair statement: " 'He willingly did so.' " There is nothing here to indicate any bad faith on the part of Mr. Kaufman in disposing of his business.

Mr. McCall: I did not mean that.

The Court: And I think that is an unfair inference.

Mr. McCall: I did not mean to make such an inference, your Honor."

As to the further questioned facts that the monies invested in the new enterprise prior to incorporation in fact constituted a present—and not some speculatively future interest—there was abundant evidence requiring the Findings:

(i) *William E. Asimow.*

"Q. By Mr. Mellinkoff: Mr. Asimow, do you know whether or not prior to the incorporation of the respondent corporation, whether or not any additional capital was put into Max Kaufman's business from others than Max Kaufman? A. Yes. Additional capital was put in in November. They went into escrow on the property across the street with funds advanced by Joseph Kaufman.

Q. How much money was put in? A. I believe he put in $6,000 at that time.

Q. What is that? A. $6,000.

Q. Who put in $6,000. A. Joseph Kaufman.

Q. Did Morris Kaufman put in anything? A. At a subsequent date Mr. Morris Kaufman put in $5,000.

Q. Was that before the incorporation or after the incorporation. A. That was before the incorporation, or, now, the $5,000 may have come in shortly after the charter was issued, but all this money came in before the books were set up for the corporation.

Q. When were the corporate books set up? A. I was requested to set them up February 1st, but I did not set them up until April 1st.

The Court: When did the corporation take over the business?

The Witness: It would be April 1st.

Q. By Mr. Mellinkoff: And prior to April 1st $11,000 had been put in by Joseph and Morris Kaufman. A. Yes, and an additional fifteen came in before April 1st from Joseph Kaufman.

Q. An additional $15,000? A. Yes, sir; there was $26,000 at the date of incorporation." [R. pp. 99-100.]

"Q. By Mr. Mellinkoff: Now, taking this figure as it is without any further deductions at all, what portion of that gross sum would you say Max Kaufman would be entitled to under his agreement existing at the time? A. He would be entitled to 40 per cent of that profit.

Q. And on what basis do you give that answer? A. Well, the corporate setup was arranged that way, 40, 30, 30, and the first three months of operation were to be taken into consideration." [R. pp. 103-104.]

Concerning the profit realized by the enterprise during the months of January, February, and March, 1946, the following colloquy is pertinent [R. p. 105]:

"The Court: May I ask, was this $9,000 distributed or was it simply kept in the business?

The Witness: It was kept in the business and was used in valuing the assets for the corporation. It was a definite factor in the transfer of the assets to the corporation."

Again, on cross-examination, the witness testified [R. pp. 107-109]:

"Q. By Mr. McCall: Mr. Asimow, when this money you spoke of a while ago—a while ago you

spoke of this money being put in escrow. That was put up by Joseph Kaufman, the $6,000? A. That is right.

Q. That was actually not paid into the business—didn't go into this grocery business but went down here into the escrow title company, didn't it? A. Yes, I believe so.

Q. That was on the purchase—put up during the purchase of this property? A. In contemplation of the corporation expansion activities.

Q. Well, there was no corporation at that time, of course? A. Well, the corporation was in formation.

Q. What about the additional $5,000? Did that go to the same place? A. No, that went into the business.

Q. Now, how do you mean that went into the business? A. A check was issued by Morris Kaufman and deposited by the Chicago Hotel and Restaurant Supply.

Q. To its bank account? A. That is right.

Q. Did you state to me a moment ago that this adidtional capital was not needed for the business but was needed to acquire that property? A. That is correct.

Q. That was what the capital was for? A. In anticipation of the corporation's requirements, building requirements.

The Court: A building to be used for the housing of the business?

The Witness: That is right.

The Court: And was the building in the name of the corporation?

The Witness: Yes. It went into escrow, I think, in November in the name of the corporation even before its actual charter issuance."

(ii) *Max Kaufman.*

In his so-called "The Facts" (App. Br. p. 37), appellant fixes the date of the removal of the wholesale business to new premises as October, 1946, *i. e.* three months before the trial date, January 10, 1947. This is but a half-truth, for the vital part of a meat business, the large cooler, was moved in April, 1946, approximately nine days after the corporate books were set up [R. p. 120]:

> "Q. By Mr. Mellinkoff: Mr. Kaufman, when did you move your wholesale business from 925 Temple over to Fremont? A. Well, we moved it in three months.
>
> Q. What about the cooler? A. We were using the cooler—using the cooler a long time.
>
> Q. How long? A. As soon as got ready.
>
> The Court: That doesn't mean anything. When was it?
>
> The Witness: About nine months."

This testimony was clarified in the following [R. p. 98]:

> "The Court: Will you ascertain that from your client?
>
> Mr. Mellinkoff: I am informed, your Honor, that in so far as the large cooling room and this new location on Fremont, that that has been in use for approximately nine months and as far as bag and baggage every last vestige of the wholesale business that was moved was moved [*sic*] approximately three months ago."

The appellee Kaufman's contemporaneous understanding of the new enterprise is well illustrated by his conversation with appellant, when the latter returned from service [R. pp. 122-123]:

> "A. I said, 'Jack, I don't own this any more. It is a corporation. Probably the corporation will be effected maybe in a couple of weeks.' I didn't know how long it will take. And I asked my brother Morris, he is right there, how much should I—what kind of salary I should put on for Jack because he didn't have the job what we had before and the meat line was—we couldn't get meat. It was hard to get. It was rationing. So we just got that much. So Morris said, 'He is not a butcher. He can be a handy boy. He is a good boy when he wants to be and $40.00 is the highest we can go.'
>
> So I took in Jack. I said, 'Jack, they are going to allow you only $40.00 from the business—the business belongs already to the corporation.' "

(iii) *Joseph Kaufman.*

Having testified that immediately after the terms of the new enterprise had been arranged (see *supra,* page 28) he had laid out money for the enterprise in the form of a check dated December 6, 1945 [R. p. 136], Joseph Kaufman testified that, in his absence, while he went to Chicago to liquidate his business there, his two brothers were managing the new enterprise. His testimony continued in part as follows [R. pp. 137-138]:

> "The Court: And you have been interested in the business ever since?
>
> The Witness: Yes, sir.
>
> The Court: That is all the questions I care to hear from you.

Mr. Mellinkoff: I just want to ask one additional thing.

"Direct Examination

By Mr. Mellinkoff:

Q. Who actually built this new building? A. I did, sir."

While appellant's counsel on cross-examination attempted to show that the new enterprise was not established until April when the corporate books were set up, he failed, for such was not the fact [R. p. 138]:

> "Q. Then you finally got all the business straightened out by April 1st to take over the store? A. The business was straightened out before I left. I would not leave if the business was not finished. The business was straightened out when I left. I will come back when I liquidate my business in Chicago and I come back. As far as money was concerned I told my brothers not to worry about it, I will finance it all the way through as much as we need for this kind of business and that he should be proud of what I had in mind about another business, manufacturing sausage."

(iv) *Morris Kaufman.*

Having testified that he invested monies at the same time as Joseph Kaufman, *i. e.* prior to the incorporation, this witness' examination continued as follows [R. pp. 140-141]:

> "The Court: Did you put the $5,000 in the business at that time?
>
> The Witness: In the business and property all the way through.
>
> The Court: At that time did you three men have an understanding that you were to have 30 per cent?
>
> The Witness: Yes, sir."

(v) *Walter Charles Richardson.*

Appellant lays great stress on the testimony of this witness as indicating that Max Kaufman remained the sole owner until the corporation books were established. But even assuming the brief testimony of the witness to be correct, it indicated nothing more than that he asked a leading question tantamount to: "Is this a corporation or are you the sole owner?" And that the appellee Kaufman took the latter alternative. If the question, instead had been: "Is this a corportion or a partnership?", appellee Kaufman—unschooled in legal terminology—would doubtless have again chosen the latter alternative.

In any event, appellee Kaufman denied the statement, and the trial court believed him [R. p. 131].

H. Valuation of Contributions.

Appellant's specification of error in that portion of Finding VIII [R. p. 24] reading:

> "Additional monies supplied by the three brothers has increased the capital investment in the corporation to approximately three times the value of the respondent Kaufman's former business."

is without merit. His argument on the point (App. Br. p. 69) can only be denominated fantastic. His argument on the question of valuation based on the profits of the new enterprise for the first three months of 1946, assumes true that which is completely false, *i. e.* that the profits were attributable solely to Max Kaufman, and not to the capital and energy already contributed by his partners. Appellant's fallacious assumption further ignores the fact that it was only because his brothers came to his rescue

that appellee Kaufman was able to remain in business at all.

The contribution to the new enterprise for which appellee Kaufman received a 40% interest was the assets of his former business. On this point, note the testimony of the witness Joseph Kaufman [R. p. 137]:

> "The Court: Do you know how much your brother put in?
>
> The Witness: Well, fortunately he could put in his assets—that was his assets in the business."

There is no dispute that his brothers contributed cash, and the language of appellant's brief at page 69 would indicate that even opposing counsel is now convinced that the contribution was for a present—not a future—interest in the business:

> "For $26,000, the two brothers acquired a 60% interest in a business which in three months earned $9,295 profits. . . ."

The following colloquy between appellant's counsel and the trial judge indicates the manner of valuation [R. pp. 112-113]:

> "Mr. McCall: I am interested, your Honor, in—what I am trying to find out about is the total amount as compared to the amount of money that was put in here by the brothers.
>
> The Court: If the stock was divided into certain proportions, one received 40 per cent and the other two 30 per cent each that would indicate the present ownership."

The trial court correctly interpreted the meaning of "capital" and "capital stock" as declared by the Supreme Court of the State of California in *Dominguez Land*

Corp. v. Daugherty, 196 Cal. 468, 477, 238 Pac. 703 (1925).

The assets of the old business representing a 40% interest in the new, the capital investment, accurately computed, was then increased two-and-one-half (2½) times over the capital of the former business. It is to be doubted that even appellant's counsel cares to quibble over the questionable distinction, if any, between the words "two-and-one-half times" and "approximately three times." If there is any difference, it is completely immaterial to the basic issue here involved, *i. e.* that in good faith, a new enterprise was created, different in form and substance from the employer's former business.

I. Completion of Organization of the New Enterprise.

The corporation planned in November [R. p. 100] or December [R. p. 136] of 1945, was incorporated well within ninety days thereafter, *i. e.* January 21, 1946. The articles of incorporation were filed in Los Angeles County January 24, 1946 [R. p. 148], and the corporation books were set up April 1, 1946 (App. Br. p. 41). It affirmatively appears that stock had been issued prior to the trial date, although the exact date of issuance is not in evidence [App. Br. p. 50; R. pp. 100, 113, 144, 148].

J. Summary of Evidence on Change of Circumstances.

It is submitted that irrespective of the precise legal name for the relationship which existed between appellee Kaufman and his two brothers after the agreement of November, 1945 (this discussed *infra*), the foregoing review of evidence demonstrates that there was in fact a

substantial change in the circumstances of the former employer, completely different from the mere changes of form which existed in all of the cases cited by appellant, as discussed, *supra,* page 15.

It is further submitted, that the former employer having in good faith disposed of his old business where appellant was formerly employed, it would have been and is unreasonable to compel re-employment. It likewise would have been and is unreasonable to compel employment by the new enterprise (in which substantial new capital had been invested in reliance on the contribution by appellee Kaufman) simply because the former employer held a minority interest in the new business. Such was the justified conclusion of the trial court.

3. Legal Effect of Foregoing Facts on "Interim" Status of the New Enterprise: Neither the Former Employer Nor the Partnership Were Obligated to Employ Appellant.

A. "Run as a Partnership."

(i) *California Law Governs.*

The Finding of the trial court that it had been agreed that the business would be run as a partnership prior to incorporation, with a forty (40%) per cent interest in appellee Kaufman and a sixty (60%) per cent interest in his two brothers [portion of Finding VII, R. p. 24] as well as the companion Finding that "In January, 1946, appellee Kaufman neither owned nor controlled the business where petitioner was formerly employed" [portion of Finding IX, R. p. 24], under the rule of *Erie Railway Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188 (1938), must be tested by applicable California law. Therefore, to avoid unduly length-

ening this brief, of the cases cited by appellant on this subject, only those decided under California law will be discussed.

(ii) *Appellant's Cited Cases Holding "No Partnership."*

Appellant cites five cases decided under California law wherein the courts ruled that there was no partnership. Not one of these cases has any remote resemblance to the case at bar—on the facts, on principle, or on the law.

Blanchard v. Kaull, et al., 44 Cal. 440, 451 (superseding 1 C. U. 665) (1872) (App. Br. p. 62), in its only mention of the question of partnership states:

> "A partnership or a joint stock company is *not necessarily* the result of an abortive attempt to organize a corporation." (Italics added.)

The case does not hold that under such circumstances there cannot be a partnership, and the inference to be drawn is that partnership may often result under such circumstances.

Smith, et al. v. Grove, et al., 47 Cal. App. (2d) 456, 118 P. (2d) 324 (1941), *Kersch v. Taber,* 67 Cal. App. (2d) 499, 154 P. (2d) 934 (1945), and *Wallace v. Pacific Electric Ry. Co., et al.,* 105 Cal. App. 664, 288 Pac. 834 (1930) (all at App. Br. p. 63), were all affirmances on appeal of lower court rulings of "no partnership." This, on the accepted principle of California law expressly stated in both the *Smith* and *Kersch Cases, supra,* that the determination of the question of existence or not of a partnership is for the trial court. *Smith, et al. v. Grove, et al., supra,* at page 461, puts the matter thus:

> ". . . and they argue earnestly that therefore the said instrument constitutes a partnership agree-

> ment. We may not so hold. The trial court made a finding directly to the contrary. We are not at liberty to disturb that finding even though we disagreed with the trial court."

In addition it is to be noted: In the *Smith Case, supra,* the agreement imposed on one party alone the burden of all expenses, the exact reverse of the factual situation in the case at bar. In *Wallace v. Pacific Electric Ry. Company, et al., supra,* a negligence case, defendant company was held not liable as a partner of defendant express company which conducted its business in Pacific Electric cars, in exchange for a percent of the net proceeds. The business was conducted by the express company alone, the court saying at page 667:

> "A sharing of profits is not the only test. There must be a community of interest in the business to constitute either a partnership or joint adventure."

Can it be doubted that in the case at bar there was a genuine "community of interest," where all the brothers contributed capital, one personally built the building to house the business, all contributed their personal services, and, in addition, all shared the profits in the agreed percentages?

Kersch v. Taber, supra, and *In re Mission Farms Dairy,* 9 Cir., 56 F. (2d) 346 (1932) (App. Br. p. 63), were both decided on the question of intent, the agreement in the latter case expressly excluding partnership, and on the further ground that monies were loaned rather than invested, and were simply to be repaid out of profits. In the *Mission Farms Dairy Case, supra,* promissory notes were given.

In the instant case there is not a scintilla of evidence that the money invested in the business was ever to be repaid in any form by anyone!

(iii) *Principles of Partnership Under California Law.*

The intention of the parties is the governing consideration (*Lusher v. Silver, et al.,* 70 Cal. App. (2d) 586, 588, 161 P. (2d) 472 (1945)). But that intent need not be expressed in a legal conclusion. As stated in *California Employment Stabilization Commission v. Walters, et al.,* 64 Cal. App. (2d) 554, 558, 149 P. (2d) 17 (1944):

> "It is held, however, that the existence of a partnership may be established although the parties may not have used the words 'partner' or 'partnership'; nor is it essential that the parties should have known that their contract in law created a partnership. (20 Cal. Jur. p. 686) It is the intent to do the things which constitute a partnership that usually determines whether or not that relationship exists between the parties."

The receipts of profits is prima facie evidence of partnership (Civil Code of California, Section 2401 (4), App. Br. App. p. 3; *Lusher v. Silver, et al., supra*). Appellant asserts the profit-sharing in the case at bar was interest on a loan (App. Br. p. 64), but it is submitted that that assertion is totally lacking in evidentiary support. Due to the accountant's delay [R. p. 101] corporate books were not set up immediately, but profits were divided because it had been so agreed; "they would consider themselves as partners, as members of the business." [R. p. 100].

Appellant likewise argues that there was no partnership because there was no proof of an agreement "to carry on the business as co-owners" (App. Br. p. 64). The law of California however, looks to substance and not form. No formalities are required (*Laughlin v. Haberfelde, et al.,* 72 Cal. App. (2d) 780, 786, 165 P. (2d) 544 (1946); *Niroad v. Farnell, et al.,* 11 Cal. App. 767, 106 Pac. 252 (1909)). The *Laughlin Case, supra,* decided after the adoption in California of the Uniform Partnership Law, declares:

> " 'In *Niroad v. Farnell, supra,* the rule is stated in the syllabus, which is borne out by the text, 'the voluntary association of partners may be shown without proving an express agreement to form a partnership; and a finding of its existence may be based upon a rational consideration of the facts and declarations of the parties, warranting the inference that the parties understood that they were partners, and acted as such.' "

In the *Niroad Case, supra,* at page 770, there was testimony to this effect:

> " 'She said she would advance the money for the engine, as the 'boys,' as she called it, were going in together.' "

In similar vein was the testimony of Joseph Kaufman. [R. p. 135]:

> "The Witness: I said, 'Max, what is the use of being downhearted and being sick about it? We will go in. We will build up a new business, a real good, going business, and we will be proud of it and I will make you proud of the business that you are in right now,' and I am trying to do that, your Honor."

The fact that some of the brothers in the present case received salaries is no bar to a partnership relationship. By agreement, partners—or some of them—may receive such compensation. (*Nielsen v. Holmes, et al.,* 82 A. C. A. 342, 350, (1947)).

Once the partnership is established, "All the partners have equal rights in the management and conduct of the partnership business." (Civil Code of California, Section 2412 (e)). Further, under Section 2412 (h) of the Civil Code of California:

> "Any difference arising as to ordinary matters connected with the partnership may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners."

Can it then be doubted that appellee Kaufman was legally unable to restore appellant against the wishes of his brothers? [R. p. 122, 123; App. Br. p. 6].

(iv) *The Partnership Was Not Obligated to Employ Appellant.*

Recognizing the weakness of his argument against existence of a partnership, appellant now urges that even if a partnership existed, it was bound by the "obligation" of the former employer. (App. Br. p. 59) This is the most specious and circular bit of reasoning in appellant's entire argument.

The question of the existence of the "obligation" imposed by the Act is not to be decided by California cases involving liability of incoming partners for goods sold and delivered (*Wine Packing Corp. of Calif. v. Voss,* 37 Cal.

App. (2d) 528, 100 P. (2d) 325 (1940); *Kennedy & Shaw Lumber Co. v. Taylor, et al.,* 3 C. U. 697, 31 Pac. 1122 (1892); both cited, App. Br. p. 60). To assert that the partnership is bound is simply to assume the fact that is sought to be established by appellant, namely—that any obligation existed.

Appellant at once recognizes (App. Br. p. 60) and then proceeds to forget that the right to re-employment is not absolute *(Boston & M.R.R. v. Bentubo,* 1 Cir., 160 F. (2d) 326 (1947), cited, App. Br. p. 67), exists only by virtue of the Act, and exists only where the former employer's circumstances have not changed (as demonstrated above) so as to make such restoration impossible or unreasonable.

B. "Pre-Incorporation Subscribers."

Even if it be assumed—as appellant urges (App. Br. p. 61)—that the brothers of appellee Kaufman were pre-incorporation subscribers for stock in a corporation to be formed, it would nonetheless be true that appellee Kaufman's circumstance had so changed as to make re-employment unreasonable.

Appellant concedes that a pre-incorporation subscription, though not reduced to writing is binding. (App. Br. p. 61). All the other conditions listed by appellant were complied with. (See, *supra,* page 38.)

If appellant's hypothesis were accepted, then appellee Kaufman had subscribed his business; the others—in reliance on that promise—had subscribed and paid their money. Under such circumstances, a fiduciary relationship would exist between appellee Kaufman and his broth-

ers analogous to that existing between partners (*Lomita Land and Water Company v. Robinson, et al.,* 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106 (1908)). And he would no longer be free to deal with the business, except for the promised purpose. *(Detwiler v. Clune,* 77 Cal. App. 562, 247 Pac. 264 (1926)).

4. Legal Effect of Foregoing Facts on the Corporation: The Corporation Was Not Obligated to Employ Appellant.

On reviewing all the evidence, the trial court concluded:

> "Respondent corporation is an independent business entity without obligation to employ petitioner." [Conclusions of Law, 4, R. p. 25.]

For appellant to argue that "The Appellee Corporation Is Merely an Incorporated Continuance of Max Kaufman's Business, Under The Same Management;" (App. Br. p. 50) is completely contrary to the facts of the case; unsupported by the decisions of federal courts, including those cited by appellant; and completely disregards the pertinent California decisions on the subject of "alter ego."

It is admitted by appellant that appellee Kaufman owns only forty (40%) percent of the stock of the corporation, (App. Br. p. 50), whereas as a pre-service employer he owned one hundred (100%) percent of the old business.

In every one of the re-employment cases cited by appellant on the subject, there was a change merely in form of the employer, without any change of ownership. (See discussion, *supra,* page 15 of *Trailmobile Co., et al. v. Whirls,* 6 Cir., 154 F. (2d) 866 (1946); *Sullivan v. Mil-*

ner Hotel Co., et al., D. C., E. D. Mich., S. D., 66 F. Supp. 607, 610 (1946); *Karas v. Klein, et al.,* D. C., D. Minn., 3rd Div., 70 F. Supp. 469, 472 (1947); and *Brown v. Luster, et al.,* 9 Cir., No. 11,544 (1947).)

In *Brown v. Luster, et al., supra,* this court at page 6, uses language peculiarly appropriate to the present case:

> "It is clear, too, that though the legislation in question is to be liberally construed for the benefit of the veteran it aims to apply its provisions to the existing relationship before induction and not to impose upon one person a liability toward another to whom there was no previous liability. (*Cf. Fishgold v. Sullivan Drydock and Repair Corp.,* 328 U. S. 275, 285.)"

Even the cases arising under the National Labor Relations Act, mentioned by appellant (App. Br. p. 66), do not sustain the proposition for which they are cited.

Appellant cannot seriously contend that "Under the National Labor Relations Act, this corporation would have been recognized as identical with Kaufman" (App. Br. p. 66), a forty (40%)per cent stockholder, when in *N.L.R.B. v. Adel Clay Products Co.,* 8 Cir., 134 F. (2d) 342 (1943), the corporation was owned 100% by the former employers; *N.L.R.B. v. Federal Engineering Co., Inc., et al.,* 6 Cir., 153 F. (2d) 233 (1946) the corporation was likewise owned one hundred (100%) percent by the former employers; and in *N.L.R.B. v. Hearst, et al.,* 9 Cir., 102 F. (2d) 658, 663 (1939) despite a closely interlocking

ownership, this Court *refused* to order reinstatement as against corporations which had not been direct employers:

> "However that may be, we hold that the respondents, other than Hearst Publications, Inc., and King Features Syndicate, Inc., were not the employers of the men in question; they cannot be compelled to reinstate such men, or to pay them back pay."

Mere knowledge of the fact that a veteran had been employed in the former business is clearly insufficient to impose on the corporation a non-existent re-employment obligation. (*Hastings v. Reynolds Metals Co., supra; Newman v. Finer, supra*).

The Act does not affect the assets of the former business with a lien which carries over to the new ownership. (*McFadden v. Dienelt, et al.,* D. C., N. D., Calif., S. D. 68 F. Supp. 951 (1946)).

In order to disregard the corporate entity and treat the corporation as being identical with the former employer, two factors, both non-existent in this case, are required under California law:

(1) Not mere influence, but such a complete unity of interest and ownership that separation of the individual and the corporation has ceased. (*Minifie v. Rowley,* 187 Cal. 481, 487, 202 Pac. 673 (1921)). Whereas in the case at bar appellee Kaufman owned only forty (40%) percent of the stock of the corporation, it has been held that an allegation of *majority* stock ownership is insufficient to establish *alter ego.* (*Dos Pueblos Ranch & Improvement Company v. Ellis, et al.,* 8 Cal. (2d) 617, 622, 67 P.(2d) 340 (1937)).

(2) It must be proved that some species of fraud or injustice exists, and to this end "Bad faith in one form or another must be shown before the court may disregard the fiction of separate corporate existence." (*Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, Incorporated,* 217 Cal. 124, 129, 17 P.(2d) 709 (1932)). As pointed out, *supra* (page 29), the trial court was impressed by the bona fides of appellee Kaufman, and *undisputed* Finding VI [R. pp. 23, 24] clearly proves it.

5. Conclusion.

Under federal and state law, as applied to the facts, there was such a change of circumstances as to render reemployment unreasonable. For compelling business reasons, the former employer gave up his former business, and acquired a minority interest in a new enterprise. He did not control the new enterprise, which declined—and could not be compelled—to employ the appellant at his former job.

POINT IV.

Appellant Made No Application For Re-Employment In His Former Position, Or a Position of Like Seniority, Status, and Pay Within Ninety Days After His Discharge from the Military Service.

1. Nature of the Provision.

A. Condition Precedent to Right to Require Re-Employment.

The wording of the pertinent provision of the Act indicates that application within the statutory period is a condition precedent to the right to require re-employment:

> "In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, *and (3) makes application for re-employment within ninety days after he is relieved from such training and service . . .*" (portion of Section 8(b)).

Even "liberal construction" cannot remove the provision from the Act. *(Cox v. Boston Consolidated Gas Co.,* 1 Cir., 161 F. (2d) 680 (1947)).

B. There Must Be a Bona Fide Effort to Secure Re-Employment in the Former Job.

> *Lawson v. Armour & Company,* 11 C. C. H. Lab. Cases 69,639, Par. 63, 302 D. C., N. D. Ga., Atlanta Div. (1946).

C. Trial Court to Determine Contested Question of Fact as to Whether or Not Definite Application Was Made.

Van Doren v. Van Doren Laundry Service, Inc., 3 Cir., 162 F. (2d) 1007, 1009 (1947).

2. Essential Facts Concerning Failure to Make Timely Application.

A. When Appellant Returned from Service the Former Employer's Circumstances Had Already Completely Changed, and There Was a New Ownership. (See *supra*, page 17 *et seq.*)

B. He Was Given a Full Explanation of the Changed Circumstances and the New Ownership; and Made No Application for Re-employment in His Former Position, Or a Position of Like Seniority, Status, and Pay.

(i) *Max Kaufman.*

"Q. By Mr. Mellinkoff: Now, Mr. Kaufman, when Gimpelson came back from the Army do you recall what if any conversation you had when he first started back to work for you? A. When Gimpelson came back I just opened my arms like a father. I explained to him every bit of it. I put a lot of work in Gimpelson because he never made a living, you know.

Q. Now don't go into that. A. Excuse me. I don't go into it. I was trying to—he should remain in this business. I explained him. I said, 'Jack, the state got the real estate. In fact, I don't have to tell you. You are the one who wanted the coolers from me.'

Q. Mr. Kaufman, just tell the court what conversation you had with Jack when he came back. A. I said, 'Jack, I don't own this any more. It is a corporation. Probably the corporation will be effected maybe in a couple of weeks.' I didn't know how long it will take. And I asked my brother Morris, he is right there, how much should I—what kind of salary I should put on for Jack because he didn't have the job what we had before and the meat line was—we couldn't get meat. It was hard to get. It was rationing. So we just got that much. So Morris said, 'He is not a butcher. He can be a handy boy. He is a good boy when he wants to be and $40.00 is the highest we can go.'

So I took in Jack. I said, 'Jack, they are going to allow you only $40.00 from the business—the business belongs already to the corporation.' My brother —we started in before January yet this is in December. 'I will give you $25.00 from my own pocket. I want you to be satisfied and then we will build up the new plant. We will probably be able to give you a job that will fit you better in it,' and with the same proposition I came to Mr. Mellinkoff." [R. pp. 122-123.]

Appellant argues that appellee Kaufman thus made a deliberate misstatment of fact when he said "'Jack, I don't own this any more.'" It is submitted, however, that in view of the circumstances which existed (see *supra,* page 17 *et seq.*), appellee Kaufman was describing the situation as accurately as any non-lawyer could be expected to do, exactly as he understood it, and precisely in accord with the legal effect of his agreement with his brothers. Moreover, he was doing what in fairness, and in law, he

should have done, i.e. explain the new conditions. As stated in the wrongful discharge case of *Hoyer v. United Dressed Beef Co., Inc., et al.,* D. C., S. D. Calif., C. D., 67 F. Supp. 730, 733 (1946):

> "But the employer should have thought of this when he re-employed him. They knew the changed conditions. The plaintiff was restored to his former job, and no new conditions were attached to it."

(ii) *Jacob S. Gimpelson.*

In response to a leading question from his counsel, appellant testified that some time after he was discharged from the service he made application for re-employment [R. p. 41]. However, he not only failed to specify exactly when or how he made the application, but his later testimony on the subject was so completely contrary to such testimony, and so completely foreign to practical human experience as to be incredible. And, the trial court did not believe him. (See *supra,* page 11.)

He testified that at his first post-service conference with his former employer "practically all the help" in the business were present [R. p. 60], yet he failed to call a single witness to corroborate his testimony as to what occurred. He testified t hat neither he [R. p. 44] nor anyone else [R. p. 61] said anything about how much money he was to get; the so-called former job as "general manager" was not mentioned, and he was simply told "to go to work and work with Morris" [R. p. 66]; there was no talk about

getting his "old job back" [R. p. 72]; and there was no mention of his so-called former "profit sharing deal" [R. pp. 61, 71].

On the other hand, on cross-examination, he reluctantly corroborated a large part of appellee Kaufman's testimony as to the explanation of the changed circumstances of the business. Among other things he admitted that he was told new money had already been put into the business and that more new capital was to follow. [R. pp. 61-63.]

C. Appellant Was Employed by the New Ownership in a Position Different in Seniority, Status, and Pay.

Appellant concedes that he was employed in a different position than he had formerly held. (App. Br. p. 25).

The pay also was different, but requires some clarification: Exclusive of any question of profits, the highest pay appellant had received from his former employer before appellant's military service was $35.00 per week, and that only for the last seven months of his employment [R. p. 54]. Because he was selling and using an automobile he received a $15.00 per week expense account [R. p. 54] but this, appellant did not consider income [R. p. 77]. In the pre-service settlement of his percentage arrangement he received approximately $2500.00 [R. p. 93].

When appellant was employed by the new ownership he received $40.00 per week from the new business [R. p. 44]

and $25.00 per week from appellee Kaufman personally [R. p. 123], or a total of $65.00 per week. (Appellant denied receiving this extra $25.00 weekly, but the trial court did not believe him.) Later the compensation from the new business was increased to $55.00 per week [R. p. 66], making a total of $80.00 per week as against basic pre-service compensation of $35.00 per week.

D. Appellant Made No Objection to This New Employment Until After the Expiration of the Statutory Period for Making Application for Re-Employment.

The appellant was discharged from the service on November 6, 1945 [*undisputed* Finding III, R. p. 23]. The statutory period of making application for re-employment expired February 6, 1946.

Appellee Kaufman testified that until March appellant "was satisfied," and that in that month appellant "started to fight with my brothers" [R. p. 123]. Later appellant quit and was re-employed, and finally—after threatening appellee Kaufman—walked out [R. p. 125].

Aside from the fact that he admitted making no objection to the new employment arrangement when he was first employed (see *supra,* page 53) appellant likewise admitted that when he first started getting the new pay, he made neither objection nor comment [R. p. 64]. He further admitted on cross-examination that he made no objection to the basic salary, nor mention of the "percentage deal" until the middle of February [R. p. 65]—*after* the expiration of the statutory period.

3. Legal Effect of Appellant's Conduct: He Failed to Make Timely Application for Reemployment and Waived Any Rights Under the Act.

A. The Facts Do Not Show Timely Application and Appellant's Conduct Was Inconsistent With Such An Assertion:

Appellant's Cases.

In *Dodds v. Williams,* D. C., D. Arizona, 68 F. Supp. 995 (1946), aff'd. *Williams v. Dodds,* 9 Cir. No. 11,526 (1947), cited by appellant (App. Br. p. 53), the veteran made timely application for re-employment orally and in writing, was refused, was offered a different job, rejected the same, and sued.

In *Levine v. Berman, 7* Cir., 161 F. (2d) 386 (1947), cited by appellant (App. Br. pp. 55, 65), the veteran made application for re-employment the day after discharge, was refused, was offered a different job, rejected the same, and sued.

In *Salter v. Becker Roofing Co.,* D. C., M. D., Alabama, N. D., 65 F. Supp. 633 (1946), cited by appellant (App. Br. pp. 53, 55) the veteran made timely written application, was offered a different job, rejected the same, and sued.

In *Brown v. Luster, et al.,* 9 Cir., No. 11,544 (1947), cited by appellant (App. Br. p. 66), the veteran made timely application for re-employment, was refused, was offered a different job, rejected the same, and sued.

Not so, appellant Gimpelson!

B. Appellant Waived "Re-employment."

There has been no showing in this case of a bona fide effort to secure re-employment prior to the expiration of the statutory period. On the contrary, the appellant voluntarily accepted a completely different employment. Under such circumstances, it is held that the veteran waives his rights under the Act.

Lawson v. Armour & Company, supra;

Hastings v. Reynolds Metals Company, supra.

If the question of waiver is to be decided other than by federal court interpretation of a federal statute, then it must be determined by the law of the State of California. As stated in *Medico-Dental Building Company of Los Angeles v. Horton & Converse,* 21 Cal. (2d) 411, 432, 132 P. (2d) 457 on hearing after 51 A. C. A. 23, 124 P. (2d) 56 (1942):

> "Waiver may be shown by conduct; and it may be the result of an act, which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished."

As demonstrated by the facts, the appellant knew of the changed circumstances, knew that he was not gettin his old job back, knew that fresh money had been put into the business, knew that additional money was coming in furtherance of the agreement between the three owners, and lastly: knew or should have known that the new money would not come in if it were suddenly learned that appellant claimed an interest in the business! Under such circumstances, it was appellant's duty, if he were

ever to assert a claim to a percentage of the profits of the business, to speak up. He failed to do so. And, instead, accepted employment in the new business and accepted the proferred salary, thus following a course of conduct "so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished."

Appellant knew that, under the then existing circumstances, so changed from the pre-service individual ownership of appellee Kaufman, he was not entitled in law or otherwise to a percentage of the profits of the business. He decided it was a good proposition, with a basic salary of $80.00 per week as against his pre-service salary of $35.00 per week. There was opportunity for advancement. If materials and a priority could have been obtained by the new enterprise [R. p. 139], an additional business would have been built up. He went to work. And in mid-February (according to appellant's own testimony), or in March (according to appellee Kaufman)—after $26,000 of new money had been invested in the business—for the first time since his discharge from the service on November 6, 1945, he commenced to raise objections, fight with the owners of the business and threaten appellee Kaufman with "OPA."

Whether it be called "waiver" (as in the federal cases decided under the Act and the California Supreme Court case cited, *supra,*) or "laches," the facts disclose a situation of the manifest "inequity of permitting a claim to be enforced." (*Winn, et al. v. Shugart, et al.,* 10 Cir., 112 F. (2d) 617 (1940); erroneously cited by appellant as being a decision of this Court (App. Br. p. 58).

Conclusion.

It is submitted that appellant has not sustained the burden of showing that the disputed Findings are "clearly erroneous"; that the Findings are supported by substantial evidence and are clearly correct; that the District Court properly concluded that the employer's circumstances have so changed as to make restoration unreasonable, that appellee corporation is an independent business entity without obligation to employ appellant, and that appellant made no application for re-employment within the statutory period. The judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellees.